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Supreme Court, U.S.
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No. 71-687

In the Supreme Court of the United States

OCTOBER TERM, 1971

DANIEL SILVA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of two counts of selling heroin, in violation of 26 U.S.C. (1964 ed.) 4705 (a), and sentenced to eight years' imprisonment. The court of appeals affirmed (Pet. App. A).

The facts adduced at trial showed that on April 9, 1970, one Sullivan, an informer, telephoned petitioner from the Bureau of Narcotics and Dangerous Drugs in Boston and ordered five bundles of heroin (Tr. 1,

pp. 3-7).[1] It was agreed that the heroin would be left in a phone booth behind a public library (Tr. 1, pp. 6-7). Federal agents, who had monitored the conversations with Sullivan's permission, accompanied him to the phone booth and found the heroin there (Tr. 1, pp. 7-8, 74; Tr. 2, p. 15). The next day Sullivan, accompanied by Agent Wheeler, contacted petitioner and paid him $500 for the heroin (Tr. 1, pp. 13-14, 82).

On April 15, 1970, Sullivan placed another call to petitioner and arranged for five more bundles to be left in a certain telephone booth on Boylston Street. This time petitioner told Sullivan to leave the money at Frankie O'Day's bar (Tr. 1, p. 16). Sullivan and the agents found the heroin in the booth (Tr. 1, p. 17; Tr. 2, p. 18) and left $500 with the bartender at Frankie O'Day's (Tr. 1, pp. 18, 89).

At the trial, the agents testified about the telephone conversation that they overheard between Sullivan and petitioner. Petitioner's sole contention is that the overhearing of the conversation by the agents was illegal under the applicable statute (18 U.S.C. 2511 (2)(c)). He argues that Sullivan's consent was coerced, since it was obtained in response to a promise by the government that he would receive lenient treatment if he cooperated. As the court below pointed out, however, promises of leniency do not constitute coercion, and accordingly the consent was valid and the agents' testimony was properly received. See

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[1] "Tr. 1" and "Tr. 2" refer, respectively, to the transcripts of the first and second days of the trial.

Good v. *United States*, 378 F. 2d 934 (C.A. 9); *McClure* v. *United States*, 332 F. 2d 19, 22 (C.A. 9), certiorari denied, 380 U.S. 945.

We also agree with the court below that the cases from the District of Columbia relied on by petitioner (Pet. 3-4, 6-7) do not conflict with this view. Indeed, the only court of appeals case (*United States* v. *Jones*, 433 F. 2d 1176 (C.A. D.C.), certiorari denied, 402 U.S. 950) held that the authorization for police monitoring involved there, which was granted in the hope and expectation of leniency, was nonetheless uncoerced and freely given. While none of those cases involved an actual promise of leniency, the courts below correctly concluded that, in the circumstances of this case, the promise of leniency was not an improper inducement and did not make Sullivan's consent involuntary.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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